Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-306

MICHAEL C. McCRARY, etc., et al., and
COLIN M. GONZALES, etc., et al.,

Petitioners,

v.

RUSSELL L. RUNYON AND KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE SCHOOL, and
FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC.,

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Green v. McDonnell Aircraft Corporation,
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Skil Corporation v. Lucerne Products, Inc.,
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Miscellaneous:

Coles, Children of Crisis (1967) 15

Encyclopedia Americana, Int'l ed., 1973, Vol. 27 17

Encyclopedia Brittanica, 1971 ed., Vol. 22 17

The Europa Year Book, 1975, Vol. II 18

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Jensen, Dr. Arthur R., and van den Haag, Dr. Ernest, Hearings on Emergency School Aid Act of 1970 (H.R. 17846), June 29, 1970, General Subcomm. on Education, House Comm. on Education and Labor, 91st Cong., 2nd Sess., 334, 343 16

Katz, Negro Performance in Interracial Situations (ch. 11 in Watson, Psychology and Race, 1974) 15

Leech, Note on Busing as a Judicial Remedy: A Socio-legal Reappraisal, 6 Ind. Law Rev. 710 (1973) 16

Proshanksy and Newton, The Nature and Meaning of Negro Self-Identity (ch 5 in Deutch, Katz, and Jensen, Social Class, Race and Psychological Development, 1968) 15

Wilcox, the Psychological Consequences of Being a Black American: A Sourcebook of Research by Black Psychologists (1971) 15

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BRIEF FOR THE RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC.,

QUESTIONS PRESENTED

1. Whether the mere fact that the district court believed the testimony of the plaintiffs and their witness, and not the testimony of the witnesses for the defendant, in an action under 42 U.S.C. Sec. 1981 instituted without warning more than three and one-half years after the discriminatory act complained of, the proof hinging upon uncorroborated telephone conversations, and in which there

was no finding or conclusion or any intimation by the district court of bad faith or perjury, is a sufficient basis for shifting plaintiffs' attorneys' fees to the defendant under the "bad faith" exception to the general American rule denying attorneys' fees to the prevailing party.

2. Whether Virginia's two-year statute of limitations which expressly applies to every action for personal injuries, or Virginia's five-year statute of limitations which expressly applies to every personal action for which no limitation is otherwise prescribed and which survives the death of the claimant, is the most nearly analogous Virginia statute of limitations applicable to a civil rights action brought under 42 U.S.C. §1981.

STATEMENT

The following facts are stated to supply omissions from the Statement of petitioners.

The petitioners, Raymond Gonzales, Margaret R. Gonzales, and their infant son, Colin M. Gonzales, are all native-born citizens of Trinidad. (A. 187) They came to this country in 1967 or 1968. (A. 176, 186, 187). The child was born on October 8, 1963. (A. 176) They returned to visit Trinidad in the summer of 1970. (A. 183) Mr. Gonzales is employed as a passenger service agent with United Air Lines. (A. 210) Mrs. Conzales is employed as a medical-steno clerk at the College of Medicine, Howard University. (A. 175) At the time of the application and at the rejection of the application the child was approximately five and one-half years of age. (A. 176)

The School does not advertise in newspapers, magazines, radio, or television. (A. 239) Most of the parents who send their children to the school learn about it from other parents. (A. 238) In May or June of 1968, a year

before the application involved here, Mrs. Gonzales made a telephone call to Fairfax-Brewster concerning the school's admission requirements, and it was sent to her then. (A. 195) They knew about the Summer Camp from a friend whose son had attended it. (A. 176) She knew from the School's Brochure that a child had to have kindergarten training to get into the first grade. (A. 197) And both Mr. and Mrs. Gonzales knew that the School required the submission of reports and records from previous schools attended, but they did not comply with these requirements when they applied for Colin. (A. 198, Tr. 101-102) The Day Nursery which Colin was attending when the application was made did not have a kindergarten program. (Tr. 281-282) No child coming from that Day Nursery had ever been admitted to a grade at the Fairfax-Brewster School. (Tr. 251-282) They only applied for admission to a particular program in the Summer Camp, but it was their plan to have the child continue in the First Grade in the fall. (A. 179, 185)

The educational objectives and practices of the School are geared to high standards of excellence, and it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity. (A. 75-86, 90-91) To qualify for admission to the First Grade, the application must show previous training, report card, evaluation, record of reading readiness and numbers testing. (A. 251) A child is admitted to the School only if he is of average intelligence and has an achievement potential in keeping with the class he seeks to enter, and he must be emotionally, socially, and physically acceptable. An applicant will not be admitted unless the Admittance Committee is satisfied that his presence in the School will be in the best interests

of himself, his classmates, and the School in general. (A. 86) The School's high standards rule out acceptance of a child in the first grade who has not had prior kindergarten training including reading and numbers. A day nursery is not the same as a kindergarten, and a child with only day nursery training would not be accepted in the First Grade. No child with only day nursery training has ever been accepted in the First Grade in the School. (A. 241-244) The enrollment contract provides that the School reserves the right to accept or deny the application of any child for any reason whatever. (A. 66)

No Negroes had ever applied prior to the application of the petitioners. (A. 244) White applicants are and have been denied admission if not qualified. (A. 244-245) Many non-Caucasians have been accepted at the school. (A. 88-89)

Mrs. Gonzales testified that she had not personally encountered or had any particular exposure to racial discrimination in Trinidad. (A. 187) Mr. Gonzales testified that he grew up in Trinidad, and that there was no racial discrimination problem at all in Trinidad. (Tr. 96) The child was rejected by Bobbe's School about a week after his rejection by Fairfax-Brewster School, and was accepted immediately at another private school in the area, which he attended for the next two years. (A. 182-183)

A notice was sent to Mr. and Mrs. Gonzales, dated May 16, 1969, stating:

> The school is, at this time, unable to accommodate the application of Colin A. Gonzales for Safari Summer Day Camp. Your check submitted with form is hereby returned. Also enclosed is the medical form which you

> so kindly had completed in advance. (P's Exh. ____, marked 2, A. 176, 73)

Mr. Gonzales testified that when the rejection notice was received he telephoned the School and was told by a Colonel or Captain Reiss that the application had been rejected because the school was not integrated. (A. 210) There was no corroboration of this telephone conversation. Captain Steuart A. Reiss denied that he had had any such telephone conversation (A. 169-170) as did Robert S. Riess. (Tr. 307) Mr. and Mrs. Gonzales testified that they told the child, then five and one-half years of age, that he had been rejected by Fairfax-Brewster School because he was black. (A. 186, 213) A Mrs. Bryant was the plaintiffs' only witness other than Mr. and Mrs. Gonzales. She testified that she telephoned the School in January, 1972, inquired as to whether the School admitted Negro children, and was told that it did not. (A. 222-223) She was not sure whether she talked to a man or a woman. (A. 223) On cross-examination she testified that she first found out about the suit when she read about it in the paper "a few months ago," that that was the first that she ever saw or knew about the suit; and that when she read about it in the paper she decided she wanted to come forward as a witness. (Tr. 148-149) When asked on cross-examination how many people she had talked to about her telephone conversation, she said that she had talked to her husband and "maybe a few neighbors." (Tr. 148-149) After further examination she testified that she had talked to Mrs. McCrary (one of the petitioners claiming against Bobbe's School), and that she did not talk to anyone else about it after that. (Tr. 150-151) When she was then asked, "Did Mrs. McCrary tell you to come here today?", counsel for the petitioners interjected, as follows:

"Mr. Brown: Your Honor, we will stipulate that Mrs. Bryant was a neighbor of the McCrarys and the Gonzaleses. They lived in the same general area; and, as a matter of fact, I had talked to Mrs. Bryant at one time about being a plaintiff in the law suit, and she didn't want to be one. So, she knew about this whole thing last summer when we were putting the lawsuit together." (Tr. 151)

SUMMARY OF ARGUMENT

I

The mere fact that the trier of the facts does not believe the testimony of the defendant's witnesses is not a sufficient basis for shifting plaintiffs' attorneys' fees to the defendant, in the absence of a finding of bad faith or perjury. There was no such finding here, and in fact the district court refused to award punitive damages.

Under the American rule attorneys' fees are not ordinarily awarded to the prevailing party in the absence of specific statutory authorization or contractual obligation. However, there are certain recognized and time-honored exceptions to the rule. That the plaintiffs' version of the facts was accepted by the district court, and not the defendant's version, does not bring the case within the "bad faith" or any other exception to the American rule. This Court only last year, in *Alyeska Pipeline Service Company v. The Wilderness Society*, decided that new exceptions cannot be made to the American rule by the courts but only by action of Congress, and stated that 28 U.S.C. Sec. 1923 is binding upon the Federal courts in prohibiting the awarding of attorneys' fees in excess of those provided in

that statute in any case brought under a Federal statute which does not expressly authorize the awarding of attorneys' fees.

42 U.S.C. Sec. 1988 does not undercut the *Alyeska* holding with respect to actions brought under code sections derived from the Civil Rights Act of 1866, such as 42 U.S.C. Sec. 1981. Under the common law of Virginia attorneys' fees would not be awarded under such circumstances. Moreover, Sec. 1988 cannot be so read because then it would be inconsistent with 28 U.S.C. Sec. 1923.

None of the cases cited by petitioners is in point. There is no precedent for the ruling they seek, which, although they seek it in the name of equity, would under the facts of this case be an inequitable result.

II.

Under the principle established in *O'Sullivan v. Felix* and reaffirmed in 1975 in *Johnson v. Railway Express Agency* specifically with respect to 42 U.S.C. Sec. 1981, if there is no specifically stated or otherwise relevant statute of limitations for a cause of action under a Federal civil rights act, the controlling period would ordinarily be the most appropriate one provided by state law. In *Johnson* the apppropriate period provided in the Tennessee statute was one year. The court below in the case at bar, sitting *en banc*, held unanimously that Virginia's two-year statute governing actions for personal injuries applied to petitioners' actions against respondents under Sec. 1981, following its earlier decisions in *Almond v. Kent*, involving a claim under Sec. 1983, and *Allen v. Gifford*, involving a claim under Sec. 1982.

In *Almond* the court pointed out that in the broad sense every action under Sec. 1983 results from "personal injuries", and that since Virginia's two-year period of limitation applies to "every action for personal injuries" it properly applies to Sec. 1983 suits.

Cases cited by petitioners to show that the term "personal injuries" as used in the statute applies only to "physical injuries", fail to do so. Petitioners' contention that the two-year statute is not applicable, being squarely opposed to the well-reasoned and well-settled construction of the statute in numerous cases at the district court and appellate court levels, and being unsupported by any precedents, must fall. Their contention that the five-year statute applicable to personal actions which survive and for which no other limitation is otherwise prescribed is the appropriate period, must therefore fall too.

The five-year period prescribed in Sec. 8-13 of the Virginia Code for written contracts which are signed by the party to be charged thereby, clearly cannot apply because no written contract was made and none signed by this respondent. If the contract analogy is proper, and we say that it is not, the claims of Mr. and Mrs. Gonzales would be barred by the three-year period prescribed in Sec 8-13 for express or implied contracts not in writing.

All but one of the cases cited by petitioners in support of the contract analogy involved an existing employment contract or collective bargaining agreement.

Each case has to be decided with reference to the peculiar statutes of limitation of the state in which the action is brought, and in the light of how the statutes have been interpreted and applied in the state, whether by state or Federal courts. The Virginia statutes have been

interpreted to make the period prescribed for actions for personal injuries the appropriate period for a Federal civil rights action. Petitioners' argument on "survivability" is only reached if that interpretation is overturned and the express language of the statutes is disregarded. But even in that case the one-year limitation for personal actions that do not survive, rather than the five-year limitation for personal actions that do survive, would apply. It is the State intention and policy as to limitations of actions and the State definition of survivability that would determine the appropriate limitation period.

ARGUMENT

I.

THE FACTS DO NOT BRING THIS CASE WITHIN ANY OF THE EXCEPTIONS TO THE AMERICAN RULE WHICH GENERALLY DENIES ATTORNEYS' FEES TO THE PREVAILING PARTY, OR WARRANT AN EXTENSION OF THE "BAD FAITH" EXCEPTION.

We submit that the short and correct answer to petitioners' claim for attorneys' fees is that *Alyeska Pipeline Service Company v. The Wilderness Society*, 44 L.Ed.2d 141 (1975) is dispositive of the point. In presenting their argument petitioners appear to have drawn heavily upon the dissents of Mr. Justice Brennan and Mr. Justice Marshall in *Alyeska*, to which they have added an argument with respect to 42 U.S.C. Sec. 1988. It should suffice to answer that argument to point out that under the common law of Virginia, as modified by its constitution and statutes, attorneys' fees are not awarded to the prevailing party merely because the witnesses for the losing party are not believed by the trier or triers of the facts, nor have petitioners cited any Virginia cases to support their novel

and plainly inequitable contention, there being none. Nor is there any Virginia case holding that a party whose witnesses are not believed by the trier or triers of the facts is guilty of bad faith.[1] The Court of Appeals said as to this point:

> "We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying 'obstinate obduracy.' Brewer v. School Board of City of Norfolk, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of 'obstinate obduracy', and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in Brewer. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception of memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation." (A. 18-19)

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[1] Also, under *Alyeska*, petitioners' argument with respect to Sec. 1988 must fall. Any remedy, such as the allowance of attorneys' fees, to be available under Sec. 1988 must be consistent with the laws of the United States. As clearly shown in *Alyeska*, the allowance of attorneys' fees, except pursuant to express authorization in a specific statute, or under one of the long-recognized exceptions to the general American rule, would be inconsistent with the fee statutes Congress has enacted, and particularly with 28 U.S.C. Sec. 1923. *Alyeska Pipeline Service Company v. The Wilderness Society*, *supra*, at 159.

In a footnote the Court pointed out that the district court, in refusing punitive damages, 'found that the defendants had not" acted recklessly or wilfully in disregard of clear existing law.' 363 F. Supp. at 1205 n. 5." The Court of Appeals discussed some of the statutes authorizing the award of attorneys' fees, and leading decisions under those statutes; the private attorney general theory (later to be repudiated in *Alyeska*); the significance of the failure of Congress to expressly provide in a statute for the award of attorneys' fees to the prevailing party in actions brought under it; and concluded by saying:

> "Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees, for we find none of the recognized exceptions applicable." (A. 21-22)

The three members of the Court of Appeals who dissented on the question of applicability of Sec. 1981 to the defendant private schools, commented as follows with respect to the district court's findings of fact:

> "We are not convinced that the district court's findings are not clearly erroneous. Such laments, however, being largely unavailing, see United States v. Johnston, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented." (n. 1, A. 25)

Thus it may be said that three of the seven judges who sat on the Court of Appeals were of the opinion that the trial court erred in finding the testimony of the plaintiffs and their witnesses believable and the testimony of defendants' witnesses unbelievable.

The Court said in *Alyeska*:

> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult indeed for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. . . And if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigations in Sec. 1983 actions seeking to vindicate constitutional rights?" 42 L.Ed.2d at 157.

At page 159 the Court said:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to the general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. Sec. 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. . ."

The recognized exceptions to the general rule, including the exception when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, were reaffirmed by the Court in *Alyeska*. But it is clear

that *Alyeska* means that those exceptions are not to be added to, whether by adding a new one or by expanding a recognized one on a novel and inherently inequitable basis. As the Court said in concluding its opinion:

> ". . . But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by the respondents and followed by the Court of Appeals." Id at 161.

The cases cited by petitioners all fall within the recognized exceptions and do not remotely resemble the case at bar. For example, *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), involved a judgment obtained by fraud and *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745 (C.A. 7, 1974), involved an action under a statute expressly providing for attorneys' fees. In *First National Bank in Sioux Falls v. Dunham*, 471 F.2d. 712 (C.A. 8, 1973), attorneys' fees were awarded Rule 54(d) of the Federal Rules of Civil Procedure. The circumstances bringing the case within the exception when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, are set forth in the opinion of the Court of Appeals, at page 713:

> "Judge Lord states in his opinion that the award of attorneys' fees was made for 'dominating reasons of justice' and because L. T. Dunham's conduct made it necessary for the plaintiff to litigate with third parties in order to enforce his judgment. The record reveals that L. T. Dunham has attempted to conceal assets, that he has made fraudulent convey-

> ances subsequent to the instigation of litigation in South Dakota, and that he engaged in extensive evasive and dilatory tactics that tended to delay and hinder the trial court. In addition, the record reveals that Thomas Dunham gave misleading testimony at the urging of L. T. Dunham, that L. T. Dunham attempted to bribe a handwriting expert and that certain records were falsified for trial. On the basis of this record, we find no abuse of discretion on the part of Judge Lord in awarding the attorneys' fees."

In *Thonen v. Jenkins*, 517 F.2d 3, 6 (C.A. 4, 1975), the district court made findings of fact which "amply support its conclusion that defendants' actions throughout the case were 'unreasonable and obdurate and obstinate', bringing the case within "the 'obdurate obstinancy' exception to the general 'American Rule' that attorney's fees are not taxed against a losing party absent a statutory provision or contractual obligation for them. . ." In *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (C.A. 5, 1971), the district court found that certain assertions by Kinnear-Weed were made fraudulently, and awarded to Humble its costs, including attorneys' fees and expert witness fees, which arose out of the fraudulent assertions.

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) and *Hall v. Cole*, 412 U.S. 1 (1973) involved the exception that a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself may be allowed to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (1973)

and *Vaughan v. Atkinson*, 369 U.S. 527 (1962) involved the exception when dilatory tactics have been employed by the losing party. In *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (C.A. 4, 1951), the court of appeals said that the justification for awarding counsel fees to the prevailing plaintiffs was that they were of small means, were members of a union which was required as bargaining agent to represent their interests as well as the interest of other members, that they had been subjected to discriminatory and oppressive conduct by the union, and that in three previous cases the same union had been before the United States Supreme Court because of its persistent discrimination against Negro members, although it has been clothed with the authority to act as bargaining representative for all of its members by the Railway Labor Act.

Petitioners argue that the fact that racial discrimination is involved in the case at bar is a factor warranting consideration by a court of equity on the question of attorneys' fees. Under *Alyeska* the argument is clearly erroneous. Racial discrimination is not "oppressive", within the meaning of the exception to the general American rule respecting the award of attorneys' fees to the prevailing party. But petitioners seize upon the fact that the conduct of the union in *Rolax* was both oppressive and discriminatory as making the two things identical for purposes of awarding attorneys' fees. This is not only specious reasoning on its face; it is clearly erroneous under *Alyeska*.

Petitioners assert that there is no longer any doubt of the "oppressive" effect that racial discrimination has upon those discriminated against, citing Proshansky and Newton, Katz, Wilcox, and Coles. The contrary is true. There is considerable doubt on the subject. In fact, there is a great

deal of respectable authority to the effect that integration of black and white children in schools is detrimental, not beneficial, to the black children, and that it increases rather than reduces unfavorable judgments and hostility between the races. See the numerous studies discussed and cited in Leech, *Note on Busing as a Judicial Remedy: A Socio-legal Reappraisal,* 6 Ind. Law Rev. 710 (1973). See also the testimony of Dr. Arthur R. Jensen, Professor of Educational Psychology, University of California at Berkeley, and Dr. Ernest van den Haag, Professor of Social Philosophy, New York University, Hearings on Emergency School Aid Act of 1970 (H.R. 17846), June 29, 1970, before the General Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2nd Sess., at 334 and 343, respectively.

There is good reason to doubt that there was any psychological injury at all to the petitioners as the result of the rejection of the application to attend summer day camp. The application was rejected on May 16, 1969, and about two weeks after that the child was admitted at the summer camp of another private school where he remained for the next two years. The child was only five and one-half years of age at the time. According to the testimony of the parents, *they* told him he was rejected because he was black. The testimony of Mr. and Mrs. Gonzales that they had no previous experience with discrimination in Trinidad—where Mr. Gonzales said there was no problem of racial discrimination at all—of which they and the child are native-born citizens, from which they came to this country about 1967 or 1968, and to which they returned for a visit in the summer of 1970, is at variance with what has become common knowledge —that there are serious racial troubles in Trinidad—and numerous authorities so attest:

The population of Trinidad is about 47 percent of African descent, with the balance composed of East Indians, 35 percent; Europeans 3 percent; Chinese, 1 percent; and mixed (colored), 14 percent. By the end of the 1960's unemployment was approaching a level of 20 percent, due in part to rapid population growth, and black militants were agitating against the supremacy of a small white minority in industry, and of East Indians and other ethnic groups in trade. In April, 1970, riots occurred in Port of Spain, and there was a short-lived revolt by elements of the nation's 800-man army. (From *The Encyclopedia Americana,* International Edition, 1973, Vol. 27, pp. 114-115)

Asian Indians form 36 percent of the total population; West Indian Negroes form 46 percent; 15 percent are mixed in origin; 2.5 percent are of British, French, Spanish, and Portugese stock, and there are a few Syrians and Chinese. The government's inability to improve the economy, living conditions and wages, and increasing unemployment led to unrest among black militants, and a state of emergency was declared in Trinidad on April 21, 1970. Members of the opposition Democratic Labour Party, Indians employed mainly in the sugar industry, Negroes employed mainly in the oil industry, and the general population of Port-of-Spain joined common cause and rioted in protest. A faction of the 850-strong Trinidad Army mutinied, and U.K. and U.S. ships were sent to stand by to help if needed. (from *The Encyclopedia Brittanica,* 1971 edition, Vol. 22, pp. 238-239)

> In 1962 Trinidad became an independent state within the commonwealth, and in 1967 became a member of the Organization of American States. "Black Power" riots in April, 1970 and a mutiny in the army which lasted six months resulted in the declaration of a state of emergency. Subsequent unrest has culminated in guerilla warfare. (from *The Europa Year Book, 1975, A World Survey*, Vol. II, p. 1554)

Petitioners refer to the School's advertisement in the yellow pages of the telephone directory, and to a flyer received by Mrs. Gonzales in response to which she sought to get the child into the summer camp. They imply, but do not argue, that somehow this makes the School a public accommodation. Originally they had claimed under 42 U.S.C. Sec. 2000a, as well as under Sec. 1981, but dropped the Sec. 2000a claim before trial, and it is not properly a point here. In any case, the contention that a private school is a public accommodation because it places its card in the yellow pages of the telephone directory is wholly without merit. Many parents would neither know the names or the locations of private schools if it were not for the yellow pages. To carry such an advertisement is an aid to them. Information sent to them upon request will quickly inform them of the high standards for admission and continuance as a student in the School. It was established by uncontradicted testimony that the School does not advertise in newspapers, magazines, radio or television (A. 239) and that most of the parents who send their children to the School learn about it from other parents (A. 238). The test as to whether a private establishment is truly private is that it is not open to all of the white members of the public who can pay the price of admission. *Tillman v. Wheaton-Haven*

Recreation Association, 410 U.S. 431 (1973). Clearly, that is [redacted] true of Fairfax-Brewster School. As to the peitioners, they had received material from the School a year before, and therefore knew all about its strict requirements. With respect to the flyer in connection with the Summer Day Camp, it is a widespread and customary practice of Summer Day Camps to send out such flyers in advance of the vacation season, and this is a fact of common knowledge.

In conclusion on this point, it is submitted that under the facts of this case it would be inequitable to award attorneys' fees to the plaintiffs even if the law allowed it.

II

THE COURT OF APPEALS CORRECTLY DECIDED THAT VIRGINIA'S TWO-YEAR STATUTE OF LIMITATIONS, WHICH EXPRESSLY APPLIES TO "EVERY ACTION FOR PERSONAL INJURIES," IS APPLICABLE TO A CIVIL RIGHTS ACTION BROUGHT IN VIRGINIA UNDER 42 U.S.C. Sec. 1981

In *O'Sullivan v. Felix*, 233 U.S. 318 (1914) this Court held that where Congress has not enacted a statute of limitations applicable to suits arising under a particular Federal civil rights statute, Federal courts will apply the most nearly analogous statute of limitations of the State in which the action is brought. In *O'Sullivan* the Court held that a one-year Louisiana statute applicable to actions for civil damages, and not a five-year limitation prescribed by a Federal statute governing suits for penalties, applied to an action for violation of the Civil Rights Act of 1871. *O'Sullivan* has been followed repeatedly by this Court. In *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966), involving a labor union's claims on behalf of its

members under the Labor Management Relations Act, which contained no statute of limitations, the question was whether a six-year Indiana statute of limitations governing claims on oral contracts, or a twenty-year Indiana statute of limitations governing claims on written contracts, was the more appropriate. The Union contended that the twenty-year limitation was more appropriate because the action was based upon a written collective bargaining agreement. The Court held, however, that the six-year statute was more appropriate, the action being based partly on oral contracts and partly on a written contract. The suit having been filed more than six years after the cause of action arose, it was held to be time-barred. The *O'Sullivan* rule was reaffirmed in *Cope v. Anderson*, 331 U.S. 461 (1947), involving the National Bank Act; *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906), involving the Sherman Act; *Campbell v. Haverhill*, 155 U.S. 610 (1895), involving the Patent Act; and, most recently, in *Johnson v. Railway Express Agency*, 44 L.Ed. 2d 295 (1975), involving 42 U.S.C. Sec. 1981. In *Johnson* the Court held that a one-year Tennessee statute of limitations was the appropriate statute, and that the suit was therefore time-barred.

In holding unanimously that Virginia's two-year statute governing actions for personal injuries applies to petitioners' actions under 42 U.S.C. Sec. 1981, against the respondents, Fairfax-Brewster School and Bobbe's School, the Court of Appeals followed earlier decisions in *Almond v. Kent*, 459 F.2d 200 (C.A. 4, 1972), involving a claim under 42 U.S.C. Sec. 1983, and *Allen v. Gifford*, 462 F.2d 615 (C.A. 4, 1972), cert. denied *sub. nom.*, *Gifford v. Allen*, 409 U.S. 876 (1972), involving a claim under 42 U.S.C. Sec. 1982. In *Almond* the district court for the eastern district of Virginia had ruled that the one-year limitation

prescribed in Section 8-24 of the Virginia Code for "every personal action for which no limitation is otherwise prescribed" and which does not survive death, applied to an action under 42 U.S.C. Sec. 1983, and therefore held the suit to be time-barred. 321 F. Supp. 1225. In a well-reasoned decision the Court of Appeals reversed, holding that the two-year limitation prescribed in the same statute for "every action for personal injuries", was the appropriate limitation for a civil rights action brought under a Federal statute which did not prescribe its own period of limitation. The court said, in part:

> ". . . In essence, Sec. 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under Sec. 1983 which is well-founded results from 'personal injuries.' Under Virginia law, it is the object of litigation which determines the applicability of a statute of limitations not the form in which suit is instituted. Birmingham v. Chesapeake & Ohio Railway Co., 98 Va. 548, 37 S.E. 17 (1900); Friedman v. Peoples Service Drug Stores, 208 Va. 700, 160 S.E. 2d 563 (1968). See also Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E. 2d 257 (1969). Hence, our conclusion that the Virginia two-year period of limitations, applying to '*every* action for personal injuries' (emphasis added), applies generally to Sec. 1983 suits.
>
> "Even if we conclude that a sec. 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation, it is 'more serious

> than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a constitutional right.' Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 488 (1961) (Harlan, J., concurring). Accordingly, we think that it more properly belongs at the two-year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period. See Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E. 2d 177 (1946)." 459 F.2d at 204.

In *Allen* the Court of Appeals reversed a holding by the district court for the eastern district of Virginia that the one-year limitation applied to a complaint charging racial discrimination in the sale of real estate in violation of 42 U.S.C. Sec. 1982. The plaintiffs in *Allen* sought compensatory and punitive damages and alleged that they had suffered humiliation, emotional stress and anxiety. In holding that the two-year limitation period applied the Court of Appeals cited its decision in *Almond* and said that

> ". . . both Sec. 1982 and Sec. 1983 were enacted to redress the infringement of civil rights. Both allow the recovery of damages for personal wrongs. We conclude, therefore, that the reasons stated in Almond for applying Virginia's two-year statute of limitations to actions under sec. 1983 make the same limitation period appropriate for personal injury suits based on sec. 1982." 462 F.2d at 615.

Petitioners' contention that the unanimous decision of the Court of Appeals on the statute of limitations question

> "squarely conflicts with an earlier ruling by the court of appeals interpreting the same statute in a non-civil rights case" (Pet. Br. at 23)

will not bear scrutiny.

The non-civil rights case referred to is *Griggs v. Farmer*, 430 F.2d 638 (1970) aff'g 314 F. Supp. 1185 (E.D. Va., 1969). The plaintiff had filed a suit in a State court for breach of promise only, and in the district court for breach of promise and for physical assault. The state court suit was removed to the district court. The plaintiff conceded that the one-year limitation provided in Sec. 8-24 of the Virginia Code for "personal actions" which do not survive was applicable to the claim for breach of promise, and that the two-year limitation provided in Sec. 8-24 for actions for "personal injuries" was applicable to the claim for physical assault. There was no dispute between the parties as to the applicable limitation periods. Each suit was filed after the period applicable to the claim or claims it contained had expired. The sole questions before the district court were whether the expired time limit for the breach of promise suit had been extended by later claims of special damages, which may in some circumstances have that effect under Virginia law, and whether the assault claim could, by virtue of F.R.Civ.P. 15(c), be revived by an amendment retroactive to the date of the commencement of the breach of promise action. As to the first question, the district court said that there was no proof adduced or authority noted establishing that the claimed damages constituted special damages, and accordingly dismissed the suit for lack of timeliness. As to the

second question, the district court ruled that the requested amendment could not relate back to the breach of promise action since it was an "entirely new claim.", and accordingly dismissed that suit also as untimely. In a half-page *per curiam* opinion the Court of Appeals affirmed the district court's rulings on both questions.

Petitioners cite *Carva Food Corporation v. Dawley*, 202 Va. 543, 118 S.E.2d 664 (9161), *Travelers Insurance Company v. Turner*, 211 Va. 552, 178 S.E.2d 503 (1971), and *Burton v. Terrell*, 368 F. Supp. 553, 557 (W.D.Va., 1973), as holding that the two-year limitation period in Section 8-24 is meant to apply only to actions based on physical injury. Yet upon examination of these cases it is discovered that *Carva and Travelers* each involved a claim for consequential damages to personal property and each held that the claim involved was governed by the one-year limitation applicable to personal actions which do not survive and for which no limitation is otherwise prescribed. Had they been claims for direct injury to property they would survive and therefore would be governed by the five-year limitation applicable to personal actions of that character. In *Burton*, which involved an action for fraud in procuring a deed of real property, the court held that the five-year limitation applies to such an action.

None of *Carva, Travelers and Burton* involved personal injuries, and none said or decided that the two-year limitation period prescribed in Sec. 8-24 for actions for personal injuries was limited in its application to those personal injuries which are purely physical in nature, nor has any case been cited by petitioners to that effect.

In a footnote (n. 20, p. 26), petitioners point to Section 8-13 of the Virginia Code[2] as containing another limitation period which might be applicable to petitioners' claims under Sec. 1981. They mention the five-year limitation period prescribed for claims founded upon written contracts signed by the party to be charged thereby, but fail to mention the three-year period prescribed for claims founded upon unwritten contracts. Petioners argue that because Sec. 1981 relates to the making and enforcement of contracts, and because their claims are based on refusals to make contracts, therefore the appropriate limitation period in Sec. 8-13 would apply to their claims.[3] We believe that the Court of Appeals correctly held that the two-year limitation period applicable to "every action for personal injuries" is the appropriate statute for actions brought under Sec. 1981, the deprivation of a constitutional right being a personal injury.

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[2] Section 8-13 of the Virginia Code, 1950, provides in pertinent part:

8-13. Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;

If it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and

If it be upon any other contract express or implied within three years . . .

[3] It is noted that Petitioners failed to state in the Petition for Writ of Certiorari any claim that Sec. 8-13 applies to their suits against respondents.

However, if the Court should take a different view and hold that Sec. 8-13 is more appropriate, then the claims of the adult Gonzaleses against this respondent would still be time-barred under the three-year limitation applicable to nonwritten contracts, because there was no written contract signed by Fairfax-Brewster School, and the suit was filed more than three and one-half years after the cause of action arose.

Six cases are cited by petitioners to support their contention that because it is the right to make and enforce contracts that is protected by Sec. 1981, the most analogous state limitation period is contained in statutory provisions applicable to contracts: *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (C.A. 5, 1971), rev'd on other grounds, 411 U.S. 792; *Green v. McDonnell Aircraft Corporation*, 463 F.2d 337 (C.A. 8, 1971), rev'd on other grounds, 411 U.S. 792; *Page v. Curtiss-Wright Corp.*, 332 F. Supp. 1060 (D.N.J., 1971); *Macklin v. Spector Freight System, Inc.*, 478 F.2d 979, 994, n. 28 (C.A.D.C., 1973); *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D.Pa., 1974); and *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass., 1972). In all except the last of the cited cases an existing employment contract or collective bargaining agreement was involved. Only in *Sims* was the nonexistent contract which the defendant refused to make with the plaintiff the *only* contract involved. In *Sims*, which involved claims under Sec. 1981 and Sec. 1982, the district court pointed out that Massachusetts has no general statute of limitations, specific statutes having been provided for specific claims, and that neither the statute fixing a two-year limitation period for torts (which the defendants argued was the more appropriate), nor the statute fixing a six-year limitation period for contracts

(which the plaintiffs argued was more appropriate) was precisely applicable. However, the court noted that in *Boudreaux, supra,* and *Page, supra,* the courts had applied the limitation period applicable to contract actions, and that in *Boudreaux* Judge Wilkey had remarked, "It is after all, the right to 'make and enforce contracts' which is protected by sec. 1981." Moreover, the contract which defendant refused to make with plaintiffs in *Sims* was an insurance contract, and the court said that insurance contracts embody property rights for purposes of 42 U.S.C. Sec. 1982. The court in *Sims* concluded that under the circumstances of the case the contract analogy was the most apt.

There are multitudinous variations among the statutes of limitations of the various states. They have different categories and different limitation periods. It is doubtful that any two are alike. The statute which may be applied in one state as the most nearly analogous may be entirely different from the statute applied in another state. Each case has to be decided with reference to the peculiar statutes of limitation of the state in which the action was brought, and in the light of how the statutes have been interpreted and applied in the state, whether by state or Federal courts. In Virginia the two-year limitation period prescribed for actions for personal injuries has been consistently applied to civil rights actions brought under Federal statutes which do not prescribe their own limitation period. The rationale for this choice of statute has been fully explicated by the Court of Appeals in *Almond,* and is both sound and in accord with state policy. Other categories of actions, with shorter or longer periods of limitation, have been applied in other states. Cases [illegible] the contracts analogy have been discussed above. Typical cases in which, as with Virginia, a different

category was felt to be more analogous, are: *Baker v. F & F Investment Co.*, 420 F.2d 1191 (C.A. 7, 1970) (Sec. 1982 action: the five-year statute of limitations of Illinois governing civil actions not otherwise provided for applied rather than the forty-year statute governing actions regarding real estate or the ten-year statute governing actions on written contracts); *Waters v. Wisconsin Steel Wks of International Harvester Co.*, 427 F.2d 476 (C.A. 7, 1970) (Sec. 1981 action: the five-year statute of Illinois governing civil actions not otherwise provided for applies); *Crosswhite v. Brown*, 424 F.2d 495 (C.A. 10, 1970) (action under Sections 1983 and 1985: the two-year statute of Oklahoma governing an "action for injury to the rights of another, not arising on contract, and not hereinafter enumerated . . ."applied); *Swan v. Board of Higher Education of City of New York*, 319 F.2d 56 (C.A. 2, 1963) (Sec. 1983 action: the six-year New York statute of limitations prescribed for actions "to recover upon a liability created by statute" applied); *Buckner v. Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N.D.Ala., 1972) (action under Sections 1981, 1988 and 2000e: the one-year Alabama statute of limitations governing "any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated", applied to the Section 1981 claim).

Although petitioners say that both the statutory history and the text in which the phrase "personal injuries" is used indicate that it must have reference to injuries of a physical or bodily nature, and that therefore it is "clear" that the case at bar is not an action for personal injuries within the meaning of the first sentence of Section 8-24 of the Virginia Code, they have failed to produce such statutory history, or a sound argument as to the text, or any cases actually supporting their con-

tention. The question of "survivability" is never reached. Their argument that this Court should hold that the five-year limitation period applies to a Sec. 1981 action amounts to a request that the Court disregard the express language of Sec. 8-24 of the Virginia Code, overrule a well-reasoned construction of the statute by the Court of Appeals in *Amond v. Kent, supra,* which has been followed in numerous cases at the district court and appellate court levels and has become the settled doctrine in Virginia, and to upset a statutory scheme and traditional scale of values with respect to the various categories of actions–a scheme and scale of values which take into account the Virginia experience and policy for protecting defendants from stale and possibly fraudulent claims which have been allowed to slumber until witnesses have moved, died or otherwise become unavailable, memories have dimmed, and documentary evidence has been lost or discarded as worthless. Fairfax-Brewster School had no inkling that petitioners intended to make any claim or file any suit against it until more than three and one-half years after the application was rejected, when the suit was filed; it had not retained the records with respect to the application and its rejection; and the claim depended in large part upon two uncorroborated and unverifiable telephone conversations.

Statutes of limitation, as stated in *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946):

> "are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared."

And as this Court said in *Burnet v. New York Central R. Co.*, 380 U.S. 424, 428 (1965):

> "Statutes of limitation are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349, 64 S.Ct. 582, 586, 88 L.Ed. 788. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."

As previously noted, the survivability question is only reached if a well-reasoned and well-settled construction of the statutes of limitation of Virginia is overturned and the express language of the statutes disregarded. But even in that case the five-year limitation sought by petitioners would not be the appropriate limitation period to be applied to a Section 1981 action. Instead, the one-year limitation period would apply. For if such an action does not survive under state law, but does survive under Federal law, still it is the State intention and policy as to limitations of actions, and the State definition of survivability that determine the appropriate limitation period.

CONCLUSION

For the foregoing reaons, that part of the judgment of the Court of Appeals which affirms the judgment of the district court on the issue of the statute of limitations should be affirmed, and that part of the judgment of the Court of Appeals which reverses the judgment of the district court awarding attorneys' fees to the petitioners should be affirmed.

Respectfully submitted,

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